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IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1977

NO. **77-1313**

LELA ENSOR BAILEY,

*Petitioner-Appellant,*

*v.*

J. W. STREET,

*Respondent-Appellee.*

*In the United States Court of Appeals for  
the Sixth Circuit, on Appeal from the United  
States District Court, Eastern District of  
Tennessee, Northeastern Division*

**PETITION FOR THE WRIT OF CERTIORARI**

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In The  
UNITED STATES SUPREME COURT  
OCTOBER TERM, 1977

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NO.

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LELA ENSOR BAILEY,  
*Petitioner-Appellant,*

*v.*

J. W. STREET,  
*Respondent-Appellee.*

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*In the United States Court of Appeals  
for the Sixth Circuit, No. 76-2015*

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**PETITION FOR THE WRIT OF CERTIORARI**

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TO THE HONORABLE SUPREME COURT OF THE  
UNITED STATES:

Petitioner Lela Ensor Bailey presents this her petition  
and says:

I. This is a petition for the writ of certiorari to have  
reviewed the decision, order, and opinion of the United  
States Court of Appeals for the Sixth Circuit rendered and  
entered in the above styled cause under Docket No. 76-2015,



whereby the Honorable United States Court of Appeals for the Sixth Circuit affirmed the opinion, order and judgment of the United States District Court for the Eastern District of Tennessee, Northeastern Division, the Honorable C. G. Neese, District Judge. The opinions are unreported and copies of same are appended hereto.

II. The grounds on which the jurisdiction of this Court is invoked are:

(a) The order, opinion and judgment sought to be reviewed is dated and was entered January 13, 1978 by the Court of Appeals for the Sixth Circuit.

(b) Jurisdiction is conferred upon this Court to review the judgment or decree of the Court of Appeals by writ of certiorari by *Title 28 U.S.C. § 1254 (1)*, which provides as follows:

§ 1254. Courts of appeals; certiorari; appeal;  
certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; \* \* \*

III. This suit, as commenced in the district court, is a suit for compensatory and punitive damages for deprivation of civil rights under the provisions of Title 42 United States Code § 1983. The District Judge dismissed petitioner's complaint filed in the district court and sustained the motion to dismiss filed by the respondent J. W. Street upon the finding and holding that a judgment entered in the Circuit Court of Carter County, Tennessee, in a

cause styled Lela Ensor Bailey and Mary Ensor v. J. W. Street, Road Superintendent, and Carter County, Tennessee [Civil Action No. 1771], is res judicata as to this civil rights action in the district court. Upon appeal by the petitioner, the Court of Appeals for the Sixth Circuit affirmed the decision of the District Judge. The only question for review by this Court is, did the Court of Appeals err as a matter of law and justice in affirming the decision and judgment of the District Judge, and in holding "that the District Court did not err in dismissing the complaint [of petitioner] on the grounds of res judicata"? Petitioner says that the Honorable Court of Appeals is in error in so holding, and that this Honorable Court should review and reverse the decision and judgment of the Court of Appeals.

IV. The constitutional provisions and statutes which are involved in this case are as follows:

*Title 42 United States Code § 1983*

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

*Title 28 United States Code § 1343*

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) \* \* \* \*

(2) \* \* \* \*

(3) To redress the deprivation, under of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637.

*United States Code Annotated, Constitution, Amendment 5, p.4:*

AMENDMENT V - CAPITAL CRIMES: DOUBLE  
JEOPARDY: SELF-INCRIMINATION: DUE  
PROCESS: JUST COMPENSATION FOR PROP-  
ERTY

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

*United States Code Annotated, Constitution, Amendments 13 and 14, p. 33:*

AMENDMENT XIV. - CITIZENSHIP: PRIVILEGES  
AND IMMUNITIES: DUE PROCESS: EQUAL  
PROTECTION \* \* \* \*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.  
\* \* \* \*

*United States Code Annotated, Constitution, Amendments 1 and 4, p. 361:*

AMENDMENT IV - SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*United States Code Annotated, Constitution, Article 3 to Article 7, p. 572:*

4 § 2, cl. 1 Constitution

#### Section 2, Clause 1. Privileges and Immunities

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.

*Tennessee Code Annotated, Sections 23-1422 & 23-1423:*

23-1422. Prerequisites to occupation. - No person or company shall, however, enter upon such land for the purpose of actually occupying the right of way, until the damages assessed by the jury of inquest and the costs have been actually paid; or if an appeal has been taken, until the bond has been given to abide by the final judgment as proved in § 23-1420. [Code 1858, § 1346; Shan., § 1865; Code 1932, § 3130; C. Supp. 1950, § 3130.]

[The provisions of this law would govern the condemnation of right-of-way for highways. Department of Highways & Public Works v. Gamble, 18 Tenn. App. 95, 73 S.W. (2d) 175].

23-1423. Action initiated by owner. - If, however, such person or company has actually taken possession of such land, occupying it for the purposes of internal improvement, the owner of such land may petition for

a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest.

Additionally, the court rendering a judgment for the plaintiff in a proceeding brought under paragraph one of this section, arising out of a cause of action identical to a cause of action that can be brought against the United States under section 1346(a) (2) or 1491 of Title 28, United States Code, or the attorney general or chief legal officer of a political subdivision of the state effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment such sum as will in the opinion of the court, or the attorney general or chief legal officer of a political subdivision of the state reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of such proceeding. [Code 1858, § 1347; Shan., § 1866; Code 1932, § 3131; Acts 1972 (Adj. S.), ch. 463, § 3.]

V. A statement of the facts of this case material to the consideration of the question presented to this Court for review by certiorari is as follows:

On January 5, 1976, petitioner Lela Ensor Bailey filed her complaint in the District Court against J. W. Street, as defendant, in Civil Action No. CIV-2-76-1, invoking the District Court's jurisdiction under Title 28



United States Code § 1343 and also under Title 28 United States Code § 1332, and seeking both punitive and compensatory damages for deprivation of civil rights by the defendant under the provisions of Title 42 United States Code § 1983. The complaint alleges that the petitioner is a citizen of the United States and a resident of the State of Kentucky; that the defendant is a resident of Carter County, Tennessee; and that the defendant [respondent herein], while acting under the color of his office of Superintendent of Roads of Carter County, Tennessee, and under the laws of Tennessee, did subject the petitioner to the deprivation of her constitutional and civil rights, namely, (1) due process of law as secured by the Fifth and Fourteenth Amendments to the Constitution, (2) of her personal property without just compensation in violation of the Fifth Amendment to the Constitution, (3) of the right to be secure in her house and effects and against unreasonable seizures as protected by the Fourth Amendment to the Constitution, and (4) of the privileges and immunities secured and protected by Article 4 § 2, Cl. 1, of the Constitution, by discriminating against her as a citizen of another state, by doing the following acts: (1) By constructing a landfill bridge across Stoney Creek, knowing same would cause a flooding and taking of petitioner's land and house thereon, and personal property therein located, by the diverting of waters upon petitioner's land and into her house to the great damage of the house, land and personal property therein located, without notice, hearing, and due process of law; (2) by the taking or damaging of the personal property therein located to the extent of being a taking by the flooding waters, caused by defendant, without just compensation, in violation of the Fifth Amendment to the Constitution; and that said flooding occurred on March 29, 1975 and in April, 1975,

while a suit was pending in the Circuit Court of Carter County, Tennessee for damages and taking resulting from flooding on April 3, 1974, caused by defendant's willful action of diverting the waters, and on March 29, 1975, the premises had to be vacated because made uninhabitable; (3) by entering upon petitioner's land and premises, located in Carter County, Tennessee, in March and April, 1975, without search warrant, without easement or right, without notice or hearing, and without permission of plaintiff, with bull dozers and other equipment and moving land and rocks off of plaintiff's land and into heaps, in violation of the Fourth Amendment to the Constitution, and at which time petitioner had a suit pending in State court seeking relief against the willful and oppressive action of the defendant J. W. Street; and (4) by depriving petitioner, a citizen of Kentucky, of privileges and immunities of citizens in Tennessee, in violation of Article 4 § 2 Cl. 1, of the U. S. Constitution, by constructing the landfill bridge of one citizen of Tennessee, while making it impossible for petitioner to come and go to her premises in Tennessee and to live on the same when visiting Tennessee because she was being discriminated against by having her premises flooded to accommodate a citizen of Tennessee.

The respondent J. W. Street filed a motion to dismiss in the District Court asserting that the complaint and action in the District Court was barred by res judicata by reason of a final judgment that was entered in the Circuit Court of Carter County, Tennessee on May 9, 1975 in the cause of Lela Ensor Bailey and Mary Ensor, plaintiffs, vs. J.W. Street, Superintendent of Roads of Carter County, and Carter County, Tennessee, defendants [Civil Action No. 1771]. The pertinent part of the adjudicating clause of the judgment in the Circuit Court in said cause reads as follows:



"IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED BY THE COURT:

"1. That the plaintiffs have and recover of defendant Carter County, Tennessee the sum of \$1500.00 as and for all damages and incidental damages, and compensation for a flowage easement over plaintiffs' land taken in manner as alleged in the complaint as amended, and the costs of the cause are taxed to the defendant Carter County, and for all of which execution will issue."

The original complaint filed by petitioner in the Circuit Court of Carter County [Cause No. 1771] against respondent Carter County, Tennessee and J. W. Street [respondent herein] sought to recover damages to both real and personal property "resulting from a nuisance created and continued by the defendants" in the flooding of the plaintiffs' property on April 3, 1974 allegedly caused by construction of a landfill bridge by J. W. Street, Road Superintendent, acting for Carter County, Tennessee.

In the state Circuit Court proceeding [Cause No. 1771], the defendants J. W. Street, Road Superintendent, and Carter County, Tennessee, interposed a motion to dismiss, asserting governmental immunity and freedom from liability under the nuisance theory, relying on these authorities: *Unicoi County v. Barnett*, 181 Tenn. 565, 182 S.W. 2d 865; *Chandler v. Davidson County*, 142 Tenn. 265, 218 S.W. 222; *Buckholtz v. Hamilton County*, 180 Tenn. 263, 174 S.W. 2d 455; *Hollers v. Campbell*, 192 Tenn. 442, 241 S.W. 2d 523; *Hawkins v. Dawn*, 208 Tenn. 544, 347 S.W. 2d 480; and *Monday v. Knox County*, 220 Tenn. 313, 417 S.W. 2d 536.

In order to avoid dismissal in the state Circuit Court, in Cause No. 1771, plaintiffs Lela Ensor Bailey and others

amended their original complaint by striking all of the material allegations of the original complaint relating to nuisance theory as the basis for damages, and making Carter County, Tennessee alone the principal and only defendant against whom plaintiffs sought damages in the ordinary way under the provisions of Section 23-1423 Tennessee Code Annotated as an inverse condemnation suit for damages resulting from flooding waters on April 3, 1974, which were alleged to have been caused by the defendants in the construction of a landfill bridge across Stoney Creek. The amendment to the complaint, in the state court, concludes: "Wherefore, plaintiffs say that they are entitled to have and recover of defendant Carter County damages for damages inflicted upon and in appropriating their said property in manner alleged, as in inverse condemnation cases."

The action in the state court [Cause No. 1771], the judgment in which the District Judge held to be res judicata as to the civil rights action in this case, went to trial to a jury "sworn to try the issues joined," \* \* \* "as made up from the complaint as amended," and the "answer of the defendants and their amendment making an Act of God a defense," and the judgment on the jury's verdict is hereinbefore quoted and is a judgment against Carter County, Tennessee only for damages to land only resulting from flooding on April 3, 1974, as alleged in the amended complaint. In the trial of said state cause of action, the Trial Judge had ruled, and rightly so, that under Section 23-1423 Tennessee Code Annotated and the law of Tennessee there is no provision for recovering compensation from a governmental agency for taking *personal property*, or for damaging such in a manner as amounts to a taking. *Jones v. Cocke County*, 1970, 61 Tenn. App. 555, 456 S.W. 2d 665 at 668. There

were no claims made nor issues made up for the jury to decide in the state court action [Cause No. 1771] regarding deprivation of civil rights by the defendant J. W. Street, Road Superintendent, and defendant Carter County, Tennessee.

The respondent J. W. Street filed with his motion to dismiss in the District Court certified copies of the complaint, the amendment to the complaint, and the answer thereto as amended, filed in the Circuit Court of Carter County, Tennessee in the cause of Lela Ensor Bailey, et al, vs. J. W. Street, Road Superintendent, and Carter County, Tennessee [Civil Action 1771], and a certified copy of the judgment entered by the Circuit Court of Carter County, Tennessee, which by the District Court was held to be res judicata as to this action for deprivation of civil rights filed in the district court.

The District Judge, in his memorandum opinion and order of June 24, 1976, whereby he dismissed petitioner's action in the District Court upon motion to dismiss or for summary judgment, in pertinent part says as follows:

"This Court is of the opinion that the plaintiff's action herein is barred on the ground of res judicata. She \* \* \* must abide by the rule that a judgment upon the merits in one suit is res judicata in another where the parties and the subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other matter which might have been presented to that end. \* \* \*" *Grubbs v. Public Utilities Commission* (1930), 281 U.S. 470, 50 S.Ct. 374, 74 L.Ed. 972, 979 (headnote 10).

"Verified exhibits before the Court reflect that Ms. Bailey sued Mr. Street in an inverse condemnation proceeding over same subject as she presents herein, and that she obtained judgment on May 22, 1975 on the merits therein. *Lela Ensor Bailey and Mary Ensor, plaintiffs v. J. W. Street, Superintendent of Roads of Carter County, Tennessee*. The plaintiff concedes that such judgment is final.

"Both lawsuits complain of the construction of a land-fill bridge across Stoney Creek in Carter County, Tennessee and flood damage to the property in which the plaintiff owns an interest as a result. Ms. Bailey claims herein that, in the process of accomplishing this public purpose, Mr. Street violated certain of her civil rights. In her earlier state court lawsuit she did not advance the federal constitutional claims she presents here. The state court was competent to decide questions arising under the federal Constitution. *Deane Hill Country Club, Inc. v. City of Knoxville*, C.A. 6th (1967), 379 F. (2d) 321, 325 [6], certiorari denied (1967), 389 U.S. 975, 88 S.Ct. 476, 19 L.Ed. (2d) 567. She is not permitted to withhold presentation of federal constitutional matters to sustain the rights she asserted in her state court action and then turn to a federal forum and litigate the same federal claim which she might have presented against Mr. Street in her state court action because she is dissatisfied with the action of the state court. 379 F. (2d) at 325 [6, 7]."

Petitioner Lela Ensor Bailey appealed the decision of the District Court to the United States Court of Appeals for the Sixth Circuit; and the Court of Appeals in its opinion, filed January 13, 1978, concisely stated its opinion in these words:



"This case was submitted on the briefs of the respective parties. Upon due consideration of the briefs and the record, we find that the District Court did not err in dismissing the complaint on the grounds of res judicata. *Rogoski v. City of Muskegon*, 550 F.2d 1075 (6th Cir. 1977); *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321, 325-26 (6th Cir. 1967).

"It is ordered that the judgment of the District Court be and it hereby is affirmed."

Upon mandate of the United States Court of Appeals for the Sixth Circuit, the District Judge under order filed Feb. 16, 1976, ordered as follows:

"IT IS ORDERED that the judgment entered in this cause on the 24th day of June, 1976, be and the same hereby is made final."

The petitioner Lela Ensor Bailey is aggrieved by the judgment of the United States Court of Appeals for the Sixth Circuit, as aforesaid, and presents this her petition for certiorari for this Honorable Court to review the said judgment of the Court of Appeals.

#### VI. REASONS AND ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The writ should be allowed by this Court for the following reasons:

(1) The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, as the authority relied on by the Court of Appeals does not decide and squarely settle the issue in this case.

(2) The Court of Appeals has decided a federal question in a way in conflict with decisions of this Court, and has departed from decisions of this Court declaring the purpose and nature of an action for deprivation of civil rights under Title 42, Section 1983, United States Code.

In amplification of point (1), it is to be noted that the Court of Appeals, in affirming the District Judge, relied on the cases of *Rogoski v. City of Muskegon*, 550 F.2d 1075 (6th Cir. 1977), and *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321, 325-26 (6th Cir. 1967). These cases are not controlling and applicable to the instant case, because the *Rogoski* case was not a suit under Title 42, U.S.C. § 1983, and in the *Deane Hill Country Club, Inc.*, case, the Court of Appeals held that Title 42, U.S.C. § 1983, was not applicable to that case.

In the *Rogoski* case, the plaintiff was seeking additional compensation under the Fifth and 14th Amendments for condemned property on ground that the land was constructively or effectively taken five years before state condemnation proceedings, and the Court of Appeals held in the case that since under Michigan law in eminent domain cases the land owner may have litigated the date of taking in the state court and had it determined to be other than the de jure date of taking, the question could not be litigated in the federal court.

In the instant case: (1) Petitioner is not seeking additional compensation for condemned land in the District Court, but is seeking damages for (a) deprivation of civil rights guaranteed by the Federal Constitution, (b) deprivation of *personal property* [household furniture and appliances, etc.] without compensation, which cannot be obtained under Tennessee law because Tennessee law does not provide for procedure for obtaining compen-



sation for or damages to personal property by a governmental agency, which question of compensation and right to compensation was not allowed to go to the jury in the state action in the Circuit Court of Carter County as an issue in the state court action by ruling of the Circuit Judge under the authority of *Jones v. Cocke County*, 61 Tenn. App. 555, 456 S.W. 2d 665 at 668, wherein it is held that Tennessee eminent domain statutes do not apply to personal property, and (c) for deprivation of civil rights under the Fourth, Fifth and 14th Amendments to the Federal Constitution by the defendant J. W. Street on dates other than April 3, 1974, which was the date involved in the state court action, that is on dates in March and April, 1975, when the defendant J. W. Street entered upon petitioner's land without authority, without search warrant, and without prior judicial hearing or process. These issues were not and could not have been litigated in the State court under Tennessee eminent domain statutes. *Tenn. Code Ann. §§ 23-1422 and 23-1423*; *Jones v. Cocke County*, supra; and *Chamberland v. Brown*, 223 Tenn. 25, 442 S.W. 2d 248.

In the state court action, the defendants J. W. Street and Carter County, Tennessee had governmental immunity on every theory of law except under the inverse condemnation statute [T.C.A. § 23-1423]. *Unicoi County v. Barnett*, 181 Tenn. 565, 182 S.W. 2d 865; *Chandler v. Davidson County*, 142 Tenn. 265, 218 S.W. 222; *Buckholtz v. Hamilton County*, 180 Tenn. 263, 174 S.W. 2d 455; *Hollers v. Campbell*, 192 Tenn. 442, 241 S.W. 2d 523, and *Hawkins v. Dawn*, 208 Tenn. 544, 347 S.W. 2d 480. Carter County, Tennessee is not a "person" under Title 42, U.S.C. § 1983, and is not subject to suit under this civil rights statute. *Monroe v. Pape*, (1961), 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492;

*Hoffman v. U. S. Dept. of Housing and Urban Development*, C.A. Tex. 1975, 519 F.2d 1160; *Meredith v. State of Arizona*, C.A. Ariz. 1973, 523 F.2d 1160. J. W. Street was a nominal party to the suit in the Circuit Court of Carter County, and Carter County, Tennessee was the party against whom relief was sought and against whom it was granted, and it was not possible to raise the civil rights issues in the state court action [Cause #1771], nor were they raised in that suit, and therefore, the judgment in the state court action [Cause #1771] was not, under the authority cited and relied on by the Court of Appeals of the Sixth Circuit, res judicata as to the civil rights action in the District Court.

The *Deane Hill Country Club, Inc.*, case, supra, relied on by the Court of Appeals in affirming the District Court in the instant case, is not controlling authority in the instant case, because in that case the Supreme Court of Tennessee had decided in the case the very point which the federal district court was called upon to decide, namely, was an ordinance of the City of Knoxville valid and constitutional, and moreover, the Court of Appeals in the *Deane Hill Country Club, Inc.*, case held that Title 42, U.S.C. § 1983 [which is involved in the instant case] was not applicable in that municipalities were not "persons" within the meaning of 42 U.S.C. § 1983.

In amplification of point or reason (2) as to why certiorari should be granted, that is, that the Court of Appeals' judgment in the instant case is in conflict with decisions of this Court, it is respectfully pointed out that this Court, in the case of *U. S. v. International Building Co.*, 1953, 345 U.S. 502, at 504, said and held:

"The governing principle is stated in *Cromwell v. County of Sac*, 94 U.S. 351, 352-353, a judgment is an absolute bar to a subsequent action on the same claim.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Also, to same effect, see *Lawlor v. National Screen Service Corp.*, 75 S.Ct. 865, 349 U.S. 322, 99 L.Ed. 1122.

The judgment of the Court of Appeals in the instant case is in conflict with the decisions of this Court in the two cases just cited, because when the rule followed by this Court in the above cited cases is applied to the facts of the instant case, it is clear that *res judicata* does not apply to petitioner's action filed in the District Court, because the demand and claim in the District Court is not the same demand and claim as was made in the state court action [Case No. 1771], and the issues raised by the complaint filed by petitioner in the District Court are not the same issues as were litigated and determined in the prior state court action. In the state court action, the only issue was did Carter County, Tennessee do acts which caused Stoney Creek to flood petitioner's land on April 3, 1974, as alleged in the complaint, as amended, in the state court action, thereby making Carter County responsive to petitioner in damages for injury on that

date done to her land and house? *Jones v. Cocke County*, 61 Tenn. App. 555, 456 S.W. 2d 665; *Johnson v. Roane County*, 212 Tenn. 433, 370 S.W. 2d 496. The issues raised by the complaint filed by petitioner in the District Court are: (2) Did respondent J. W. Street, acting under authority of his office as Superintendent of Roads of Carter County, enter upon petitioner's land in *March and April, 1975* without authority, without search warrant, without permission from petitioner or her agents or cotenant, and without having taken previous judicial proceeding, and bull doze her land in violation of her rights under the Fourth Amendment to the Federal Constitution? (2) Did respondent J. W. Street, acting under color of state law and his office of Superintendent of Roads, damage or take petitioner's *personal property* without compensation and without procedural due process by filing condemnation proceedings and affording petitioner a hearing, in violation of the Fifth and 14th Amendments to the Constitution? (3) Did respondent J. W. Street, acting under color of state law and under color of his office, injure or damage petitioner's land or cause same to be damaged or injured in March and April, 1975, in such manner as to amount to a taking and was it a taking without due process and compensation, in violation of the Fifth and 14th Amendment? (4) Did J. W. Street, acting under color of state law, discriminate against petitioner and deprive her of her privileges under Article 4, § 2, Cl. 1 of the Federal Constitution? These issues were not, and could not have been, litigated in the state court action, and *res judicata* is not applicable.

The state court action involved *property* rights, but the civil rights action in the District Court involves *personal* rights assured by the Federal Constitution. *Lynch v. Household Finance Corporation*, 405 U.S. 538,



92 S.Ct. 1113. The civil rights action in the instant case as filed in the District Court does not involve the same demand and claim as was made in the prior state action.

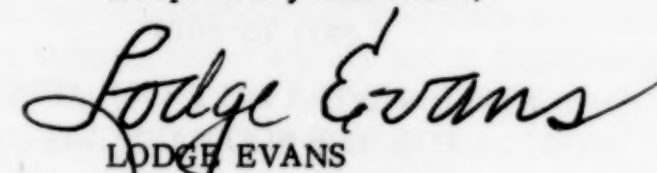
In the *Monroe v. Pape* (1961), 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492, case, this Court held that the remedy under Rev. Stat. § 1979 (42 U.S.C. § 1983) is a proceeding to redress injuries to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position; provides a remedy where state law is inadequate; and that the federal remedy "is supplementary to the state remedy." This Court has, therefore, said that the remedy under 42 U.S.C. § 1983 is an independent demand and claim different and in addition to any state remedy. The Court of Appeals, in the instant case, has applied res judicata contrary to the holding of this Court in the case of *Monroe v. Pape*. Relative to petitioner's Fourth Amendment rights, the Court's attention is invited to *Camara v. Municipal Court of City and County of San Francisco*, 87 S.Ct. 1727.

## VII. RELIEF SOUGHT

WHEREFORE, petitioner Lela Ensor Bailey prays that the writ of certiorari, for which this is the first application, issue from this Honorable Supreme Court to the Court of Appeals for the Sixth Circuit, at Cincinnati, Ohio, and to the Clerk thereof, to certify and transmit to this Court the entire record and proceedings in this cause and the opinion and decree of the Court of Appeals; that this case be placed upon the docket of the Court for argument; that the judgment, opinion, and decree of the Court of Appeals of the Sixth Circuit in this cause be reviewed and reversed and the errors com-

plained of corrected; that the judgment of the Court of Appeals be reversed; and that the cause be remanded to the United States District Court for the Eastern District of Tennessee, Northeastern Division, at Greeneville, Tennessee, for trial upon the merits; that justice be done and for general relief.

Respectfully submitted,



LODGE EVANS  
Arcade Building  
609 Elk Avenue  
Elizabethton, Tennessee 37643

Attorney for the Petitioner  
Lela Ensor Bailey



## APPENDUM

ORDER of United States Court of Appeals for  
the Sixth Circuit, entered January 13, 1978.

NO. 76-2015

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

LELA ENSOR BAILEY,	)	
	)	
Plaintiff- Appellant,	)	
	)	
v.	)	ORDER
	)	
J. W. STREET,	)	FILED
	)	JAN 13 1978
Defendant-Appellee.)	)	John P. Hehman, Clerk

Before: CELEBREZZE, ENGEL and KEITH, Circuit Judges.

Appellant, Bailey, owns an interest in certain real estate in Carter County, Tennessee. Appellee is Road Superintendent of Carter County. Appellant and her co-owner brought an action in State Court to recover damages for injury caused to her property by water being diverted onto her property by a new bridge built nearby by Carter County. The State Court action, which resulted in a judgment of \$1500.00 for Appellant also named Appellee and Carter County as Defendants.

Appellant subsequently brought an action in the U. S. District Court based upon 48 U.S.C. § 1983, alleging a

deprivation of Appellant's civil rights. The District Court dismissed Appellant's complaint on the grounds that the suit was barred by the prior State Court action on the principles of *res judicata*. This appeal followed.

[2]

This case was submitted on the briefs of the respective parties. Upon due consideration of the briefs and record, we find that the District Court did not err in dismissing the complaint on the grounds of *res judicata*. *Rogowski v. City of Muskegon*, 550 F.2d 1075 (6th Cir. 1977); *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321, 325-26 (6th Cir. 1967).

It is ordered that the judgment of the District Court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

Clerk

**ORDER on Mandate Affirming Judgment of District Court, entered February 16, 1978, In The United States District Court for the Eastern District of Tennessee.**

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE

LELA ENSOR BAILEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. CIV-2-76-1
	)	
J. W. STREET,	)	
	)	FILED
Respondent.	)	FEB 16 1978

**ORDER ON MANDATE AFFIRMING  
JUDGMENT OF DISTRICT COURT**

Lela Ensor Bailey, having appealed to the United States Court of Appeals for the Sixth Circuit on the eighth day of July, 1976, from the judgment entered in this cause on the 24th day of June, 1976, and the said Court of Appeals having issued its mandate dated the 13th day of January, 1978, wherein it was ordered that the judgment of the United States District Court was affirmed;

Now, therefore, upon the mandate of the United States Court of Appeals for the Sixth Circuit, dated the 13th day of January, 1978, and filed herein on the 10th day of February, 1978,

IT IS ORDERED that the judgment entered in this cause on the 24th day of June, 1976, be and the same hereby is made final.

ENTER:

/s/ C. G. NEESE

( C. G. Neese )

United States District Judge

**MEMORANDUM OPINION AND ORDER entered June 24, 1976 in the United States District Court for the Eastern District of Tennessee.**

In The  
UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE

LELA ENSOR BAILEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CIV-2-76-1
	)	
J. W. STREET,	)	FILED
	)	JUN 24 1976
Defendant.	)	

**MEMORANDUM OPINION AND ORDER**

This is an action to recover money damages for the alleged deprivation by the defendant of the plaintiff's

federal civil rights. 42 U.S.C. § 1983. The Court's jurisdiction was invoked\*

[2]

under 28 U.S.C. § 1343 (3). The defendant moved for a dismissal of the action for lack of the Court's jurisdiction of the subject matter, Rule 12 (b) (1), Federal Rules of Civil Procedure, and for the failure of the plaintiff to state a claim upon which relief can be granted, Rule 12 (b) (6), Federal Rules of Civil Procedure, or in the alternative for a summary judgment, Rule 56 (b), Federal Rules of Civil Procedure.

This Court is of opinion that the plaintiff's action herein is barred on the ground of res judicata. She " \* \* \* must abide by the rule that a judgment upon the merits in one suit is res judicata in another where the parties and the subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other matter which might have been presented to that end. \* \* \*" *Grubbs v. Public Utilities Commission* (1930), 281 U.S. 470, 479, 50 S.Ct. 374, 74 L.Ed. 972, 979 (headnote 10).

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\* The plaintiff also undertook to invoke this Court's diversity jurisdiction under 28 U.S.C. § 1332 (a)(1) as between citizens of different states; however, she claimed only that she was a "resident" of Kentucky and that the defendant was a "resident" of Tennessee. These constitute insufficient allegations of the respective citizenships of the parties. *Smith v. Dealers Transit, Inc.*, D. C. Tenn. (1964), 239 F. Supp. 605, 607 [9], cited in *Grise v. Crownover*, D. C. Tenn. (1971), 57 F.R.D. 210, 211, n. [1]. Of course, defective allegations of jurisdiction may be amended, 28 U.S.C. § 1653; *Wells v. Celanese Corporation of America*, D. C. Tenn. (1964), 239 F. Supp. 603, 604, but the disposition of this matter renders the additional invoking of the Court's jurisdiction irrelevant.

Verified exhibits before the Court reflect that Ms. Bailey sued Mr. Street in an inverse condemnation proceeding over same subject

[3]

as she presents herein, and that she obtained a judgment on May 22, 1975 on the merits therein. *Lela Ensor Bailey and Mary Ensor*, plaintiffs, v. *J. W. Street, Superintendent of Roads of Carter County, Tennessee*, defendant, civil action no. 1771 in the Circuit Court of Carter County, Tennessee. The plaintiff concedes that such judgment is final.

Both lawsuits complain of the construction of a landfill bridge across Stoney Creek in Carter County, Tennessee and flood damage to the property in which the plaintiff owns an interest as a result. Ms. Bailey claims herein that, in the process of accomplishing this public purpose, Mr. Street violated certain of her civil rights. In her earlier state court lawsuit she did not advance the federal constitutional claims she presents here. The state court was competent to decide questions arising under the federal Constitution. *Deane Hill Country Club, Inc. v. City of Knoxville*, C.A. 6th (1967), 379 F. (2d) 321, 325 [6], certiorari denied (1967), 389 U.S. 975, 88 S.Ct. 476, 19 L.Ed. (2d) 567. She is not permitted to withhold presentation of federal constitutional matters to sustain the rights she asserted in her state court action and then turn to a

[4]

federal forum and litigate the same federal claim which she might have presented against Mr. Street in her state court action because she is dissatisfied with the action of the state court. *Ibid.*, 379 F. (2d) at 325 [6, 7].



For such reason, the defendant's motion for a dismissal of this action for the failure of the plaintiff to state a claim on which relief can be granted hereby is SUSTAINED, and this action hereby is

DISMISSED.

ENTER:

/s/ C. G. NEESE

( C. G. Neese )  
United States District Judge

# CERTIFICATE OF SERVICE

I, Lodge Evans, Attorney for Petitioner Lela Ensor Bailey in the cause of Lela Ensor Bailey v. J. W. Street, certify that I have on the date that appears on the letter of transmittal to the Clerk of the United States Supreme Court by which the foregoing petition is transmitted for filing served the foregoing petition for certiorari and appendum upon counsel for J. W. Street, the respondent, as follows:

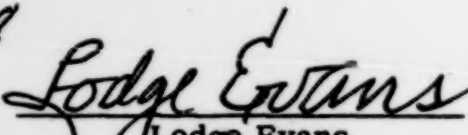
(1) I have on the date indicated delivered three copies of the petition for certiorari and appendum into the hands of and left same with Mr. Robert E. Banks and Mr. Lewis Merryman

Attorneys at Law  
Riverview Building  
Academy St. at Elk Ave.  
Elizabethton, Tenn. 37643

(2) I have on the date indicated deposited three copies of the petition for certiorari and appendum in the United States Mail at Elizabethton, Tennessee, first class postage prepaid, in an envelope properly sealed and addressed as follows:

Mr. S. J. Milligan  
Milligan, Coleman, Fletcher & Gaby  
Attorneys at Law  
First National Bank Building  
Greeneville, Tennessee 37743.

Witness my hand 3/16/78

  
Lodge Evans  
Attorney for Petitioner